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IN THE

Supreme Court of the United States

October Term, 1969

No. 1573

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

v.

MARY LOUISE EDWARDS and OLIVER L. JOHNSON, LIVINGSTONE M. JOHNSON and JUSTIN M. JOHNSON, co-partners under the name of JOHNSON, JOHNSON & JOHNSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

JUSTIN M. JOHNSON,
812 Allegheny Building,
429 Forbes Avenue,
Pittsburgh, Pennsylvania 15219,
Attorney for Co-Partner Respondents.

JOHNSON, JOHNSON & JOHNSON,
Of Counsel.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
9022 CARLYN DRIVE, PITTSBURGH, PA., 15236,
412-881-7463.

INDEX.

	PAGE
Question Presented for Review	1
Statement of the Case	2
Argument	5
I. The attempted assertion of a constitutional right by petitioner has not been timely made	5
II. Petitioner has had, both in law and fact, every opportunity to present its evidence in complete accord with the applicable decisions of this Court	8
Conclusion	14
Appendix—Brief for Appellants in Superior Court	15

Table of Citations.

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98 (1932) 7, 8, 9
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930) 8, 12
Cipa v. Metropolitan Life Insurance Co., 155 Pa. Super. 339, 38 A. 2d 518 (1944) 6
Citizens National Bank v. Durr, 257 U. S. 99, 66 L. Ed. 149, 42 S. Ct. 15 (1921) 5
Edwards v. Metropolitan Life Insurance Co., 212 Pa. Super. 751, 242 A. 2d 281 (1968) 3
Georgia Ry. & El. Co. v. Decatur, 295 U. S. 165, 79 L. Ed. 1365, 55 S. Ct. 701 (1935) 9
Helis v. Ward, 308 U. S. 365, 84 L. Ed. 327, 60 S. Ct. 283 (1939) 11
Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794 (1935) 5, 7
Missouri v. Gehner, 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326 (1930) 5
Saunders v. Shaw, 244 U. S. 317, 61 L. Ed. 1163, 37 S. Ct. 638 (1917) 6, 7, 8, 10
Schoen v. Elsasser, 315 Pa. 65, 172 A. 301 (1934) 12

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Question Presented for Review

May a party elect to withhold evidence in hopes of prevailing on a misapprehension of applicable state law and, thereafter, plead surprise and denial of due process upon the modification of a judgment by an appellate state court where the rights of the parties clearly appear of record?

Statement of the Case

This case involves an attorney-client relationship and the interference in that relationship by third parties. The co-partner respondents, herein referred to as the Johnsons, had effectuated a recovery for their client, the individual respondent, herein referred to as Edwards, from the petitioner life insurance company, herein referred to as Metropolitan.

Metropolitan permitted the Johnsons to secure court approval of the settlement and to have the docket marked settled and discontinued while the company actively concealed the fact that Edwards had communicated directly with Metropolitan and would not honor her obligation to pay her attorneys' fee to the Johnsons based upon the recovery secured for her benefit (R. 596a, 611a, 627a, 629a; Pet. for Writ, Appendix, pp. 18-19, 25-26). Metropolitan refused to honor the express assignment to the Johnsons of that amount of the recovery constituting their fee (R. 65a), bypassed the Johnsons in mailing directly to Edwards a check for her portion of the recovery (R. 70a-72a), and then demanded that the Johnsons submit to a separate interpleader action in order to recover their fee (R. 453a-454a, 821a-822a, 827a-828a).

Immediately after depositing the amount of the Johnsons' fee into court, Metropolitan petitioned for discharge from further liability and for allowance of costs and counsel fees to be paid from the interpleaded fund (R. 101a-104a). The prayer was denied by the trial court (R. 136a-140a). Metropolitan then deposited additional monies into court and, again, petitioned for discharge and allowance of costs and counsel fees (R. 145a-154a). Metropolitan objected to the release of the fund to the Johnsons until

its costs and counsel fees had been carved therefrom, even though the Johnsons' right to the entire fund had been established both by the trial court and the appellate state court (R. 107a, 140a-144a, 166a-169a, *Edwards v. Metropolitan Life Insurance Company,* 212 Pa. Superior Ct. 751, 242 A. 2d 281 (1968)).

Extensive hearings were thereafter held in the trial court on the issue of Metropolitan's bad faith and active interference in the attorney-client relationship between the Johnsons and Edwards (R. 185a-838a). After the conclusion of its case, and while the Johnsons were attempting to put in their evidence, Metropolitan sought successfully to introduce so-called "rebuttal testimony" through a witness brought to the Pennsylvania trial court from New York. The witness appeared as a result of numerous objections by Johnsons' counsel to repeated attempts by Metropolitan to place unsworn testimony on the record.[1]

Metropolitan's witness was given every opportunity to testify, on two separate occasions, through interruption of the Johnsons' case (R. 484a-498a, 534a-634a). Although the witness' testimony was proffered as "rebuttal testimony" (R. 484a), the trial court on several occasions challenged its admissibility (R. 489a, 497a).

At no point in the proceedings did the trial court deny any offer by Metropolitan to submit further evidence. The record is silent as to any real offer by Metropolitan to introduce further evidence. At the conclusion of the hearings, which lasted eight days, and after the trial court expressly asked all counsel whether there was any further testimony (R. 776a), orders were entered reducing the

[1] See, *e.g.*, R. 190a-192a, 202a-203a, 234a-250a-2, 278a, 280a, 286a-287a, 351a-359a, 364a, 457a, 462a, 473a-480a, 482a, 514a, 519a, 522a-523a, 527a, 529a, and 685a-689a. The trial court recognized this tactic as improper (R. 355a, 358a and 364a).

Johnsons' fee, discharging Metropolitan from liability, and awarding Metropolitan its costs and counsel fees not to exceed $500.00 (R. 785a-786a).

On appeal by the Johnsons, the Superior Court of Pennsylvania reversed the orders of the trial court, holding that it was an abuse of discretion by the trial court to discharge Metropolitan from further liability and to allow it costs and an attorneys' fee where the record was absolutely clear that Metropolitan had been a partial participant in the controversy, had been guilty of bad faith, and had engaged in acts which constituted unjustifiable interference with the attorney-client relationship as a matter of law. The state appellate court, exercising its powers under state law, found that the record in the case required a reversal of the lower court orders and a grant to the Johnsons of the full amount of the interpleaded fund.

The case was remanded to the trial court solely for the purpose of entering judgment as modified by the state appellate court. Metropolitan's right to discharge was preserved on remand, subject only to its compliance with the judgment as modified.

The action of the Superior Court in reversing and remanding for entry of judgment was in complete harmony with the express prayer of the Johnsons as set forth extensively in their Brief for Appellants before that court (Johnsons' Brief, pp. 35-37, "III. Disposition of the Appeal", and pp. 38-39, "IV. Conclusion", Appendix, pp. 15-19). Metropolitan, in its reply brief before that court, ignored making any response to the legal arguments and citations set forth in the Johnsons' brief, as aforesaid, and—without citation of authority—suggested that a reversal would "merely result in sending the case back to the lower court for another hearing."

In its Petition for Reargument addressed to the Superior Court, Metropolitan attempted to argue that the civil judgment rendered by the state appellate court had, in some way, "convicted" Metropolitan of impropriety. There was no suggestion of deprivation of life, liberty or property advanced by Metropolitan to the Superior Court. Not until that petition had been denied, and a later Petition for Allowance of Appeal to the state supreme court was presented, did Metropolitan raise, for the first time, any question of deprivation of property without due process of law. Presumably, this argument went to its failure to be permitted $500.00 in costs.

The state appellate courts rejected both arguments.

ARGUMENT

I. The attempted assertion of a constitutional right by petitioner has not been timely made.

The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the state court actually entertains the question and decides it. *Herndon v. Georgia,* 295 U. S. 441, at 443, 79 L. Ed. 1530, at 1532, 55 S. Ct. 794, at 795 (1935); *Citizens National Bank v. Durr,* 257 U. S. 99, at 106, 66 L. Ed. 149, at 152, 42 S. Ct. 15, at 16 (1921); *Missouri v. Gehner,* 281 U. S. 313, at 320, 74 L. Ed. 870, at 875, 50 S. Ct. 326, at 327 (1930).

Petitioner contends, however, that the instant case falls within a narrowly prescribed exception to the rule. As pointed out in the *Herndon* case, *supra,* 295 U. S. 441, at 444:

> "There is no doubt that the federal claim was timely if the ruling of the state court could not have been

> anticipated and a petition for rehearing presented the first opportunity for raising it. . . . The whole point, therefore, is whether the ruling here assailed should have been anticipated."

Saunders v. Shaw, 244 U. S. 317, 61 L. Ed. 1163, 37 S. Ct. 638 (1917), upon which petitioner solely relies, is inapposite. In *Saunders*, the intervening defendant had been prevented from introducing testimony to prove a benefit to land sought to be taxed by a drainage district upon the trial court having ruled inadmissible evidence of the taxpayer-plaintiff on the issue of benefit. Your Honorable Court there held that an application for rehearing was timely, where the petitioner could not anticipate the disposition of the case at the close of the proceedings in the state supreme court and where the petitioner raised the federal question at the first conceivable opportunity.

The protection afforded by the exception to the general rule, as set forth in the *Saunders* case, requires two important circumstances, both of which must be satisfied before the exception may be invoked. First, the construction of law laid down by the state appellate court must be one that the party affected could not have anticipated. Second, and of equal importance, the party affected, *thus surprised*, must present the federal question at the first opportunity. The petitioner here involved has satisfied neither prerequisite.

The process by which the state appellate court decided this case was not unusual. In point of fact, petitioner had itself utilized the same procedure to its own benefit in an earlier case before the very county trial court and state appellate court from which this petition has been brought. *Cipa v. Metropolitan Life Insurance Co.*, 155 Pa. Super. 339, 38 A. 2d 518 (1944). The power of the state

appellate court to correct any error of law, reverse the trial court's orders and direct the entry of appropriate judgments was argued extensively in respondents' Brief for Appellants before the Superior Court of Pennsylvania and on oral argument (Appendix, pp. 15-17). Included in the formal argument before that court was the clear, direct request that the matter be finally determined without resort to further, protracted hearings where the rights of all the parties were clearly set forth in the record.

Petitioner did not make response to the legal arguments and authorities set forth in the brief and on oral argument but—without citation of authority—contented itself in suggesting to the state appellate court that a reversal would "merely result in sending the case back to the lower court for another hearing." A ruling is not to be regarded as unanticipated by the party where it is one that follows precisely the prayer for relief by appellant in the state court to which prayer the appellee might well be expected to respond. *Cf. Herndon v. Georgia, supra,* 295 U. S. 441, at 446.

In its Petition for Reargument addressed to the state appellate court, petitioner merely attempted to argue that the civil judgment had, in some way, "convicted" petitioner of impropriety (Pet. for Writ, App., pp. 44, 45). It was not until petitioner had been rejected twice by the Superior Court that it raised, explicitly, for the first time, in its petition to the Supreme Court of Pennsylvania, the federal question here asserted, to-wit, the deprivation of property without due process of law.

This attempt to convert an objection raised, if at all, as a matter of state law to a federal objection at a later stage in the proceeding does not fit within the exception laid down in the *Saunders* case. *American Surety Co. v. Baldwin,*

287 U. S. 156, at 164, 77 L. Ed. 231, at 236, 53 S. Ct. 98, at 100-101 (1932).

It follows that petitioner's contention that it raised the federal question at the first opportunity is without substance. The action of the state appellate court in reversing and remanding for entry of judgment, having been in complete harmony with the express prayer for relief in that court, can not be said to have been unanticipated. The petition seeking to secure federal review must, therefor, be denied by your Honorable Court.

II. Petitioner has had, both in law and fact, every opportunity to present its evidence in complete accord with the applicable decisions of this Court.

Even if it were determined that petitioner has timely raised the constitutional question it seeks to present for review, it is clear that the disposition of this case by the state courts has been consistent with the standards of due process laid down by this Court. It is central to an understanding of the issue here raised to first remove from consideration what this case does *not* involve. Unlike *Saunders v. Shaw, supra*, this case does not involve the unanticipated act of the state supreme court in giving to a statue a new construction which threatened rights under the Constitution. *Cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, at 677-678, 74 L. Ed. 1107, at 1111-1112, 50 S. Ct. 451 at 453 (1930); *American Surety Co. v. Baldwin, supra*, 287 U. S. 156, at 164, 77 L. Ed. at 236-237, 53 S. Ct. at 101.

The rule laid down in the *Saunders* case properly declares that a *refusal* of a court to receive or consider proof on a material subject amounts to a denial of a

hearing on that issue, in contravention of the due process clause. *Georgia Ry. & El. Co. v. Decatur*, 295 U. S. 165, 79 L. Ed. 1365, 55 S. Ct. 701 (1935). In the instant case, however, petitioner can point to neither a refusal to consider proof nor any objection on its part to the proceedings.

On the contrary, the opinion and orders of the trial court were entered only after every party had an opportunity to present whatever evidence it desired (R. 782a). The record is absolutely devoid of any request to present testimony by petitioner which was refused by the trial court. It would be entirely without precedent to permit a party to elect to withhold evidence in an attempt to gain the benefits of a favorable decision at the trial court, offer no objection at time of trial, and yet be permitted to reopen merely upon the ground that the state appellate court found error in the proceedings unfavorable to that party. As was aptly stated by this Court in the *Baldwin* case, *supra*, 287 U. S. 156, at 169, 77 L. Ed. at 239, 53 S. Ct. at 102:

> "The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied."

Both in its presentation of its case and upon appeal by respondents in the state court, petitioner relied on its belief that partiality, collusion and bad faith on its part could not prevent its escaping liability for its wrongdoing and compelling the injured parties to underwrite its costs. At the conclusion of the trial, counsel for petitioner submitted his theory of the case to the court as follows (R. 779a):

> "That motion was that the relief requested in my two petitions for discharge and for costs and fee be allowed

> at this time; first, because it is not good ground for denying them *even if the additional plaintiffs have proved that the Metropolitan Life was not impartial and did collude with one of the parties in the controversy;* the second ground is that their proof of that didn't measure up, it is incredible and inadequate." [emphasis supplied.]

In its brief to the state appellate court, petitioner again attempted to assert that the evidence at trial on the issue of bad faith and collusion was immaterial, in stating, at page 13 in its brief in the Superior Court:

> "It follows that the two orders appealed from, the one granting a discharge to the defendant and the other allowing its costs and attorney's fee out of the fund paid into court, should be affirmed *if this court holds that the charges made by the additional plaintiffs of partiality and collusion as a matter of law are not a sufficient ground for refusing the defendant the discharge from liability* for the amounts paid into court *and its costs and counsel fee.*" [emphasis supplied.]

That petitioner's understanding of the state law was entirely different from that of the state appellate court is further seen, when it goes on to submit in its brief in the Superior Court, at page 25:

> "We respectfully submit that the order granting the defendant a discharge from liability with respect to the amounts paid into court as being in dispute should be affirmed *regardless of what evidence the additional plaintiffs were able to adduce to support their charges of partiality on the part of defendant and collusion by it with the original plaintiff.*" [emphasis supplied.]

The fact that the case was tried by petitioner in the state court, and argued by it on appeal, on an understanding of the state law different from that of the state appellate court is not, *per se*, sufficient to cause a remand for a new trial under the rule of *Saunders v. Shaw, supra.* All

parties had ample opportunity to introduce whatever evidence they felt necessary for a proper understanding of the issues. Complete establishment of the facts was thus made prior to appeal in the state tribunal. To be sure, petitioner now asserts that on a new trial it would further attempt to attack the credibility of one of respondents' witnesses. The difficulty with petitioner's position, however, is that its voluntary election to withhold its so-called rebuttal testimony at the trial constituted a relinquishment of the "proper opportunity to present its evidence" which it now seeks.

Petitioner cannot now complain that it has not had its day in court and has been deprived of due process of law contrary to the Fourteenth Amendment. Due process of law is not concerned with mere afterthoughts. *Helis v. Ward*, 308 U. S. 365, at 370, 84 L. Ed. 327, at 329, 60 S. Ct. 283, at 285 (1939). In the case of *Helis v. Ward, supra*, a suit for specific performance of a contract had been brought involving the purchase of a mineral lease. The price was to be determined by a formula based upon the production of certain wells. The District Court gave judgment for the defendant, interpreting the contract as requiring a certain formula for measuring oil flow. The Circuit Court of Appeals reversed the judgment dismissing the bill, and remanded with directions to enter judgment for the plaintiffs for a balance due under the contract, with interest, basing its action on a master's report filed in the trial court, but interpreting the contract in a manner materially different from the trial court. On appeal, this Court held that the rendering of judgment for plaintiff instead of remanding the cause for a new trial was not a deprivation of due process where the testimony established appellant's right to recover under the correct interpretation of law. Such is the case here.

The only matter which this Court need here consider is whether the petitioner has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. As stated by the late Mr. Justice Brandeis, in the *Brinkerhoff-Faris* case, *supra*, 281 U. S. 673, at 680, 74 L. Ed. at 1113, 50 S. Ct. at 454:

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court."

The Pennsylvania procedural law, and the rulings sought to be reviewed in this case, are entirely in accord with the applicable decisions of this Court. The case cited by petitioner to the state supreme court to support its "right" to present additional rebuttal testimony clearly holds that an *offer* of testimony must be made, and that offer *refused* by the court before there can possibly be anything of substance for review. *Schoen v. Elsasser*, 315 Pa. 65, 172 A. 301 (1934).

This case involves nothing more than the application of well-recognized principles of law to an admittedly unique, if somewhat unfortunate set of facts, none of which would justify the allowance of an appeal to your Honorable Court. The Superior Court of Pennsylvania based its judgment upon the entire record, and without doing violence to constitutional principles. As the state appellate court, speaking through Judge Cercone, pointed out in this case,

215 Pa. Super. 390, at 401-402, 259 A. 2d 183, at 188-189, Pet. for Writ, App., pp. 25-27:

"When Metropolitan permitted Johnsons to secure court approval of the settlement and to have the docket marked settled and discontinued and a certificate to that effect forwarded to it, without divulging to Johnsons that claimant, their client, had communicated directly with Metropolitan's counsel that she would not honor any assignment made by her, Metropolitan at that point, if not before, became a partial participant in the controversy. *By its silence, it knowingly and intentionally set in motion a chain of events which no impartial viewer of the facts would have tolerated or permitted . . .*

"Metropolitan seeks to justify its actions on the ground that it was effectuating a company policy . . . . However, *regardless of the motives that prompted the Company into so actively participating in behalf of claimant, its actions in this case constituted unjustifiable interference with the client-attorney relationship that existed between claimant and the Johnsons. Its failure to notify the Johnsons about claimant's communication was an act of bad faith on the part of Metropolitan which cannot be absolved by indications of intent to benefit the beneficiary or to effectuate some company policy . . .*

"*It is clear from the record that* rather than conciliate the dispute between claimant and her lawyers, *Metropolitan acted in an unusual and partisan fashion, working to effectuate a payment to claimant that would by-pass the Johnsons in their rightful role of attorneys for claimant. We do not condone such action. We must, therefore, hold that the hearing judge erred in dischargng Metropolitan from further liability and in holding that Metropolitan was entitled to an attorney's fee and court costs.*"

Conclusion

No substantial federal question is here presented for review. The attempted assertion of deprivation of a constitutional right has not been timely made. The record amply demonstrates that the decision of the Superior Court of Pennsylvania was in full accord with the applicable decisions of this Court. The application for a writ of certiorari to review the decision of the Superior Court of Pennsylvania should be denied, for the reasons herein set forth.

Respectfully submitted,

JUSTIN M. JOHNSON, ESQUIRE,
Attorney for Co-partner Respondents.

JOHNSON, JOHNSON & JOHNSON,
Of Counsel.

APPENDIX

IN THE
SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

No. 89 APRIL TERM, 1969

MARY LOUISE EDWARDS,
Plaintiff,

and

OLIVER L. JOHNSON, LIVINGSTONE M. JOHNSON and JUSTIN M. JOHNSON, co-partners under the name of JOHNSON, JOHNSON & JOHNSON,
Additional Plaintiffs-Appellants,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Defendant.

BRIEF FOR APPELLANTS

Argument for Appellant.

III. Disposition of the appeal

Your Honorable Court has the power to correct any error of law made in the trial of this case, reverse the trial Court's orders and direct the entry of the appropriate judgments. The Superior Court may reverse, amend, or modify any order, judgment or decree as it may think to be

just. Act of June 24, 1895, P. L. 212, § 8, par. 8; 17 P. S. § 192.

36

Argument for Appellant.

This statutory authority to modify a judgment is exercised only in exceptional circumstances. *Cipa v. Metropolitan Life Insurance Co.*, 155 Pa. Super. 339, 38 A. 2d 518 (1944); *Cusati v. Dellisanti*, 152 Pa. Super. 223, 31 A. 2d 604 (1943). Such is the instant case.

The order awarding $1,132.84 to the original plaintiff, Edwards, was unwarranted, for the reasons set forth above. The orders awarding costs to Metropolitan and discharging Metropolitan of all liability to the Appellants and from all future liability for costs incurred must be set aside, for the simple reason that Metropolitan has not demonstrated its entitlement to either costs or discharge. *Roeper v. Monarch Life Insurance Co.*, 138 Pa. Super. 283, 11 A. 2d 184 (1940).

All of the evidence admitted in the trial Court establishes both the Appellants' clear right to distribution of the entire proceeds and the Appellants' right to recover costs from Metropolitan. To return this case to the lower Court, more than two years after the Appellants have become entitled to judgment would cause additional delay and a deprivation of justice. *Creighan v. City of Pittsburgh*, 389 Pa. 569, 132 A. 2d 867 (1957); *cf. Weisel v. McBride*, 191 Pa. Super. 411, 156 A. 2d 613 (1959); *Jordon v. Sun Life Assurance Co. of Canada*, 366 Pa. 495, 77 A. 2d 631 (1951).

The fact that this case was tried by the Court does not preclude your Honorable Court from disposing of the

case with finality, where the facts are so clear. *Weisel v. McBride, supra.*

37

Argument for Appellant.

To order a new trial would in itself work a hardship on all parties concerned. The hearings here involved lasted eight days. It would be supererogatory to go through another long trial when the record demonstrates that the issues were properly presented by the Appellants. The parties have had their day in Court. No reason exists for a repetition of this matter, where it has twice been before your Honorable Court and has been before six separate judges of the lower Court. *Richette v. Pennsylvania R. R.*, 410 Pa. 6, 28-29, 187 A. 2d 910 (1963).

The order of Judge McKenna entered June 2, 1967 (R. 95a) denying the petition for a hearing on the interpleader should be vacated. The orders of Judge Wessel entered December 3, 1968 and December 5, 1968 (R. 785a, 786a, 788a, 835a-837a) granting an award to the original plaintiff, Edwards, discharging Metropolitan and allowing Metropolitan attorneys' fees and costs should be reversed.

This Court must conclude that it is both proper and just to award to the Appellants the entire proceeds of the funds paid into Court, together with interest on the sum of $8,036.77 from January 12, 1967 (R. 97a-99a). This Court must conclude that the costs of this proceeding be borne by Metropolitan.

Justice demands that the orders and decrees of the lower Court be modified accordingly and made final on this appeal.

38

IV. Conclusion

The record graphically exposes to your Honorable Court the pattern and course of conduct of the interpleading insurance company. Metropolitan is here seeking equitable relief. It not only misled Appellants but actively dealt with Appellants' client. This was in bad faith and contrary to ethics of the profession. It is with poor grace that Metropolitan invokes, or even attempts to invoke, the protection found in an interpleader action.

Edwards, the original plaintiff, has been accorded the attention of the lower Court long after this Honorable Court determined she had no interest in the fund which has always been the subject of this present litigation. This Honorable Court should determine finally, and without further proceedings, that she is barred by valid doctrines of law and equity from her attempt to unjustly enrich herself by asking for an unwarranted protracted indulgence of the Court. The contingent fee agreement and assignment which she has sought twice to attack on appeal are free of inconsistencies and irregularities. As Judge Wessel noted in his opinion:

> ". . . [Appellants] have acted for the best interest of their client, they have done good work, and certainly deserve the compensation to a good steward, . . ."

Wherefore, it is respectfully submitted that the orders issued by the lower Court from the bench,

together with the orders filed in accordance therewith, (a) discharging Metropolitan of all liability to the Johnsons, (b) granting Metropolitan costs and attorneys' fees not to exceed $500.00 and (c) directing that the interpleaded fund be divided between Edwards ($1,132.84) and the Johnsons ($6,500.00) must be reversed. It is further respectfully submitted that the order of Judge McKenna denying the Johnsons' Petition for Rule to Show Cause, filed June 2, 1967, should be vacated. It is further respectfully submitted that this Honorable Court should dispose of this appeal by awarding to the Appellants the entire proceeds of the funds paid into Court, together with interest on the sum of $8,036.77 from January 12, 1967 and by placing all costs of this proceeding on Metropolitan.

Respectfully submitted,

JUSTIN M. JOHNSON,
Attorney for Appellants.

JOHNSON, JOHNSON & JOHNSON,
Of Counsel.